ENSURING A FAIR HEARING- MATTERS INVOLVING PERSONS WITH A MENTAL ILLNESS, COGNITIVE IMPAIRMENT OR INTELLECTUAL DISABILITY – HEARINGS IN THE GUARDIANSHIP LIST AT VCAT

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1. How VCAT conducts guardianship hearings – the law

98 of the VCAT Act 1998 provides (in part):

(1) The Tribunal— (a) is bound by the rules of natural justice;

(b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;

(c) may inform itself on any matter as it sees fit;

(d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.

(4) Subsection (1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice.

Section 98 is supported by section 24 of the *Charter of Human Rights and Responsibilities Act* 2008, which provides:

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Charter rights apply in VCAT proceedings. They can only be limited to the extent allowed by section 7(2) of the Charter Act, which provides:

> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
> (a) the nature of the right; and
> (b) the importance of the purpose of the limitation; and
> (c) the nature and extent of the limitation; and
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

At guardianship hearings, the Tribunal makes decisions about the capacity of persons to make reasonable judgements for themselves. This affects the person's autonomy in making future decisions. Questions of capacity to decide for oneself and autonomy in making decisions about one's life are central to the person's human rights. Procedural fairness in making such decisions is crucial.

Looking at section 98(4) of the VCAT Act 1998, questions might arise about whether it is inconsistent with section 24 of the Charter. Any non-compliance with the rules of natural justice must still amount to a fair hearing, subject to section 7(2) of the charter.

In conducting guardianship hearings, the Tribunal must balance all these requirements.

2. How VCAT conducts guardianship hearings – practical issues

While procedural fairness is crucial, it is challenging at times to ensure that occurs while observing all the other requirements of a guardianship hearing.

For example, of their nature many guardianship hearings are informal, because only family members and the proposed represented person are present. Some of them may be frail. Most of them will not have been in a tribunal or court hearing before. They would be confused or intimidated if processes are too formal. They sometimes rely on the Tribunal member to decide everything. Their concerns are about practical issues rather than about the law.

It might be useful to have a preliminary meeting to explain why there is a need for technical or medical evidence about capacity of the proposed represented person and what that means. However, we do not have the resources available for that.

Evidence will be given at the hearing about the proposed represented person's (PRP's) disability and the effect of that disability on their capacity to make reasonable judgements. Evidence will often be in written form – from a GP, hospital registrar, specialist, geriatrician, psychiatrist, neuro-psychologist, psychologist. All these written reports may be very technical.

There will also be evidence about whether the proposed represented person needs a guardian or administrator. That might be from other health practitioners, such as an occupational therapist, speech therapist, ACAS clinician, case manager or social worker.

The parties may not understand the significance of the evidence – why it is important to the decision. They might not understand the evidence itself, either because it is too detailed or because the language used is technical. There may be technical legal issues to consider too – competing opinions for example.

There may be family tensions about what is to happen to the proposed represented person. These need to be managed so that the hearing can proceed in an orderly way. They may also be relevant though to the decision made by the tribunal member. When appointing a guardian, the legislation requires the tribunal consider, for example, the desirability of preserving existing family relationships and whether the proposed guardian and administrator are compatible with each other. The tribunal must also be satisfied that the person appointed will act in the best interests of the proposed represented person. So the tribunal might find for example that the PRP's daughter cannot be appointed as guardian because she refuses to speak with her brother who is the PRP's primary carer. In order to accord procedural fairness to the parties, it is sometimes appropriate to warn them that their behaviour may be relevant to the decision.

At a hearing, the tribunal may hear complex evidence about financial arrangements, such as a family business, family trusts, and arrangements for a family farm. These issues might make the hearing longer and more complex than is possible or fair for frail elderly persons and some accommodation may need to be made for that.

3. Three situations

I have chosen three situations where procedural fairness must be carefully considered and will list some of the means VCAT members use to manage these. My aim is to show that what might be a denial of procedural fairness is not a denial if properly managed .One of the most challenging issues is that the parties are self-represented and may not even be aware of any of their rights. They depend on the person conducting the hearing to be aware of their rights and to observe them. In those situations the Tribunal member should still carefully test the evidence.

4. Situations where the parties have not seen or understood the evidence

Procedural fairness requires that each part have knowledge of the evidence produced by the other parties and an opportunity to respond to it. Yet in guardianship hearings, sometimes there will be parties who have not seen the doctors' reports about the capacity of the proposed represented person – perhaps for example because the doctor has sent the report straight to the tribunal and the other parties have not seen a copy.

Even where the parties have seen the written medical evidence, they may not have understood it, or may not have grasped the significance of parts of it.

Often this occurs in situations where there is little dispute about the evidence, but still the Tribunal should assist the parties to understand why the evidence is significant, in case they would disagree and in case they can provide relevant evidence about the issues.

There are a number of things Tribunal members do to help parties understand the evidence and why it matters:

- Explain why the medical evidence is relevant to the decision (to show whether the PRP has a disability which makes her unable to make reasonable judgements for herself)
- If the parties have not seen the written reports, give them copies – these can be retrieved at the end of the hearing, to protect the privacy of the PRP
- Indicate and read out the most relevant parts of the evidence and explain how they affect the Tribunal's decision
- Summarise the evidence
- Offer more than one opportunity to respond to the evidence

These measures are sometimes insufficient to ensure that a party who wishes to oppose the evidence has a proper opportunity to do so. However, it is worth remembering that these proceedings are not adversarial. There is no adversary. The only person whose rights are affected is the PRP.

In most guardianship cases, the parties are s not legally represented and unfamiliar with the procedure. The applicant (often a health or social work professional) may be so intent on the protection of the PRP that they are urging the tribunal to ignore the PRP's rights (protected by the *Guardianship and Administration Act* 1986 which requires the tribunal to make the least restrictive order possible).

There will usually be little contradiction of expert evidence coming from any of the parties. So it is the tribunal's task to test the evidence. The statute says we are to make the least restrictive decision possible. We test the evidence by for example, asking questions such as whether the medical report is recent, whether there were any factors affecting the PRP's capacity when the report was made,

whether the PRP's situation has changed in a way which might have since improved their capacity, whether this is the most appropriate evidence. If necessary, the applicant can be given an opportunity to adjourn for more evidence.

It is important to hear what family members say about the technical evidence because they may be able to assist with this task – for example, they may have information about the circumstances surrounding medical examination which do not appear in the report, or were not made clear to the practitioner – for example that the PRP had ceased particular medication, or just begun new medication, or was suffering from an infection at the time of the examination.

Where questions like that arise about the medical evidence, the tribunal may be able to telephone the practitioner, to avoid adjourning the matter for answers to those questions.

The tribunal also needs to test the less technical evidence. Sometimes, a group of health professionals, case-managers, social workers will be so intent on their duty of care or on solving a problem that they are inclined to overlook the rights of the PRP to be as independent as possible.

5. Situations where the PRP contests the evidence about capacity

These same issues arise in relation to the PRP when the issue is their capacity to make reasonable judgements – they may be someone who disputes the evidence about capacity. Procedural fairness says they should be given an opportunity to understand the evidence and respond to it. If they wish to obtain a different medical report, the hearing can be adjourned for that to occur. If there is any doubt at all about his issue, the tribunal would usually adjourn, perhaps referring the matter for investigation.

In many cases, while the PRP may disagree with the evidence of a medical practitioner about their capacity, it will not be necessary to wait for new evidence. The situation will often be clear from the medical reports and family and friends may support it.

However, the tribunal gives an opportunity to the PRP to hear and respond to the evidence. There are situations when they can provide additional evidence which raises questions about the medical evidence – for example, that they were taking new medication at the time of the examination, or that the interpreter provided did not speak the correct version of their language, or that the doctor did not understand their full history and there is another doctor who does.

In order to give the PRP the best chance of providing that sort of relevant evidence, the tribunal explains the medical evidence to them as far as possible. It is best to mention all the significant evidence. It is not sufficient to say for example "Mrs Jones Dr Lee says you are getting a bit forgetful", even if the full details of the report are confronting.

It is useful to allow the PRP to say all they wish and to respond to some disagreements and denials. For example" you say you did not meet Dr Lee but I think you must have because he has written a report saying he met you three times last month".

Allowing this sort of discussion gives an opportunity for the PRP to give evidence which is relevant to the question of capacity. It may also be relevant to the question of whether the PRP needs a substitute decision-maker.

6. Tribunal member meets privately with the PRP

Sometimes, the Tribunal member will meet privately with the PRP. In the *Guardianship and Administration Act* 1986 the wishes of the PRP are central to decision-making. The tribunal member

may even visit the PRP separately from the hearing, if there is a dispute about their wishes. Sometimes, the PRP may be too frail to attend the hearing, may be intimidated by the room and the number of people at the hearing or by the presence of different 'camps' of family members.

If the PRP has a legal representative, that person would often stay in the room while the Tribunal has a private meeting with the PRP. Often though, there is no lawyer. If the PRP wants another person to stay with them then that can be accommodated.

Still, as Halsbury says "It is a fundamental principle of the rule against bias that a judge must not hear or receive representations from one party to proceedings, unknown to the other" (Halsbury's Laws of Australia, 10-2054). It creates an appearance of bias. So why would the Tribunal meet privately with the PRP?

The wishes of the PRP are central to the legislation under which we operate. They may not be easily or properly reported any other way. The person most affected by any guardianship decision is the PRP. No one else has their rights affected by these decisions, so the person who must be accorded a fair hearing is the PRP.

Is this a breach of the fair hearing rule? Well section 98(4) of the VCAT Act permits a departure from the rules of natural justice where the enabling enactment authorises it either expressly or impliedly. It is more than arguable that the G and A Act authorises a departure by emphasising the centrality of the wishes of the PRP. However, it is also arguable that it is not a departure from the rules of natural justice when there is no adversary party. Caution is needed for all sorts of reasons (e.g. the PRP may have been 'coached' or family members may think she has been coached).

When meeting privately with the PRP, it is best hat tribunal members explain to the parties why this is happening and allow them to make any submissions about it. If an applicant or another party objects to a private meeting, the tribunal would usually allow them to make submissions about the proposal before deciding to go ahead. Usually though, in my experience, the other parties do not oppose the Tribunal meeting privately with the PRP.

We are working in a jurisdiction which is 'protective' and the person whose rights are most affected is the one who has least cause for complaint about a private meeting. However, it is not without difficulty and is only one method amongst others of ascertaining the wishes of the PRP. This sort of procedure requires that Tribunal members be aware of the potential for their own views to be biased.

As I said to begin with, one of the challenges in our work is that the tribunal member is often the only person in the room worrying about procedural fairness, where the concerns of the other parties will be about practical issues concerning the care of a person who may lack capacity to make their own decisions.